

W. H. Froh, Inc. and Local 299, International Brotherhood of Teamsters, AFL-CIO.¹ Case 7-CA-31438

February 8, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 24, 1992, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, W. H. Froh, Inc., New Haven, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Stephens finds that the basis for his partial dissent in *Redd-I, Inc.*, 290 NLRB 1115 (1988), is not present here and agrees that the amended complaint allegation of unlawful discrimination is closely related to the original charge allegations and is, therefore, not barred by Sec. 10(b) of the Act.

Linda Hammell, Esq., for the General Counsel.
Terence K. Jolly and Marta D. Remeniuk, Esqs. (Matheson, Parr, Schuler, Ewald, Ester & Cooke), of Troy, Michigan, for the Respondent.

Ms. Sharon Davie, Recording Secretary and Business Agent, Local 299, International Brotherhood of Teamsters, AFL-CIO, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried at Detroit, Michigan, on January 27 and 28 and February 24, 1992.¹ On an unfair labor practice charge, filed on January 25 by the Charging Party, Local 299, Inter-

¹ Unless otherwise stated, all dates are in 1991.

national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO (the Union), in Case 7-CA-31438, the Regional Director for Region 7 issued a complaint and notice of hearing on March 6, alleging that Respondent, W. H. Froh, Inc., had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), by terminating a unit of employees and utilizing other means to perform the work previously done by the unit employees, without having given the Union, which was the employees' exclusive bargaining representative, a meaningful opportunity to bargain collectively about the decisions to terminate the employees and use other means to perform their work.

On an amended charge filed by the Union on September 12, in Case 7-CA-31438, the Regional Director issued an amended complaint and notice of hearing on December 27, realleging the violations of Section 8(a)(5) and (1) of the Act set forth in the original complaint, and further alleging that by this same conduct Respondent had discriminated against the unit employees in violation of Section 8(a)(3) and (1) of the Act. Respondent has denied committing the alleged unfair labor practices.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, with its principal office and place of business in the city of New Haven, Michigan, transports freight and commodities in interstate commerce. During the year ending December 31, 1990, a representative period, Respondent in the course and conduct of its business, derived gross revenues in excess of \$50,000 from the transportation of freight and commodities in interstate commerce. By virtue of its business operations, as described above, Respondent functions as an essential link in the transportation of freight and commodities in interstate commerce. The amended complaint alleges, the Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The amended complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

On November 1, 1987, Respondent and the Union executed a 3-year collective-bargaining agreement covering a unit of Respondent's employees, appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act, consisting of the over-the-road drivers at Respond-

² The General Counsel's posthearing motion to substitute corrected Tr. 480-502 for the corresponding pages in the original incorrect version of the transcript is granted. Also granted is the General Counsel's motion to amend the transcript at Tr. 480-481 and 483-485 to reflect correctly the identity of the speakers.

ent's New Haven facility, which is described in the contract as "the New Haven Foundry Division." The contract's expiration date was October 31, 1990. This was the last of several agreements marking a collective-bargaining relationship dating back more than 11 years.

At all times material to this case, Respondent has augmented its employee complement with 180 to 200 independent contractors and their tractors. Respondent has utilized its employees and the independent contractors to haul freight in interstate commerce, within Michigan and between the United States and Canada. In addition to the New Haven facility, Respondent maintains terminals at Laredo and El Paso, Texas.

Until 1987, Respondent utilized the bargaining unit employees mostly to service a single customer, New Haven Foundry, hauling automotive castings. From 1987 until 1990, the volume of Respondent's business attributable to New Haven Foundry decreased drastically. As this decrease continued, Respondent provided other work for the unit employees, without any reduction in working hours.

In 1987 or 1988, Respondent transferred driver Doube from its Port Huron facility to the New Haven facility. The record shows that he was a member of Local 339 and was not included in the Union's bargaining unit.³

The record is silent as to the details of any instance of conflict between Respondent and the Union during the life of their final collective-bargaining agreement. However, I find from the testimony of Thomas Krueger, who Respondent employed from June 1984 until September 1990, first as comptroller and ultimately as vice president of finance and operations,⁴ that Respondent and its president and owner, William Neely, "[had] a history of kind of like battling with the union over the course of [Krueger's] employment [at Froh], it was always a struggle." I also find from Krueger's testimony that in 1989 and 1990, William Neely, repeatedly voiced hostility toward the Union, and stated his desire to rid his New Haven terminal of the Union. According to Krueger:

It was always [William Neely's] opinion that all he had to do was sell the equipment, get rid of the equipment and by doing that, it would alleviate the necessity to have union employees.

Krueger's testimony also shows that President Neely's express object in getting rid of the equipment was "basically to break the [U]nion."

In August 1990, the Union notified Respondent, the Michigan Employment Relations Commission, and the Federal Mediation and Conciliation Service that the 1987 collective-bargaining agreement would expire on October 31, 1990, and that the Union wished to renew the agreement, but wanted to negotiate changes and revisions. In early October 1990, the Union again notified Respondent of their contract's ap-

proaching expiration and requested the scheduling of negotiations. Receiving no response, the Union, on October 22, 1990, addressed another request to Respondent, seeking negotiations for a new contract. Respondent did not answer until early December 1990.

By letter dated December 3, 1990, and received a few days later, Respondent replied to the Union as follows:

This is to advise you that the company intends to terminate the collective bargaining agreement. We are willing to negotiate a closing agreement on behalf of your two members. The market place, age of the equipment [sic], and potential litigation make it necessary to terminate our agreement. Please call me at your earliest convenience to set a date for a negotiated closing.

The potential litigation referred to in Respondent's letter of December 3, 1990, became actual 2 days later. On December 5, 1990, the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, which administer benefits for Teamsters locals such as the Union, filed a complaint against Respondent, in a United States district court, alleging violations of statutory and contractual obligations to contribute to those funds. Under the expired collective-bargaining agreement, Respondent was obligated to contribute to the fund on behalf of its bargaining unit employees. Central States claimed that Respondent was making insufficient payments to the fund.

The filing of the complaint in the U.S. district court occurred after the Central States Fund had audited Respondent's records. I find from Krueger's testimony that at the time Respondent discharged him in September 1990, the Central States Fund had completed its audit. I also find from Krueger's testimony that the audit provoked some of President Neely's antiunion remarks.

I find from the testimony of Respondent's employee Carol Bosche that, in October 1990, President William Neely advised her about the pending Central States Pension Fund lawsuit against Respondent. I also find from Bosche's testimony that conversations with William Neely and Respondent's attorney, in Chicago, Charles Cole, taught her that Respondent considered the lawsuit to be "a high priority item because there was a significant potential dollar amount involved." According to Bosche's credited testimony, in October and November 1990, Respondent believed the claim was for approximately \$1.5 million.

On Friday, December 7, 1990, Michael Robertson, a member of the New Haven bargaining unit, drove his assigned tractor, designated as No. 1200, without encountering any operating problem. At the close of the day, Robertson parked his tractor, punched out, and went home for the weekend.

On Sunday, December 9, 1990, Robertson, who Respondent had employed as a driver since May 1985, made his usual weekend telephone call to Respondent's dispatcher, William Putsky, to inquire about a driving assignment. Putsky announced that Robertson's tractor was not available, because of mechanical problems.

On December 10, Robertson phoned Vice President Michael Gene Neely, who returned Robertson's call, and informed him that he was laid off. Prior to this encounter with Vice President Neely, Respondent had not warned Robertson

³ I find from Union Business Agent Sharon Davie's testimony that at all times material to this case, the Union's bargaining unit at Respondent's New Haven facility included only Michael Robertson and James Beversdorf.

⁴ I based my findings regarding Krueger's job titles on his testimony. Respondent's witness, Vice President Michael Gene Neely, testified that Krueger had been its comptroller. However, Krueger's assertion that he ultimately became a vice president remained uncontradicted.

of a possible layoff. On or about December 12, Robertson received a written notice from Respondent, under Vice President Neely's signature, bearing the following message:

Effective with the end of your tour of duty for week ending 12/8/90, you are hereby laid off until further notice.

On Friday, December 21, James Beversdorf, a driver in the Union's foundry division bargaining unit, suffered the same fate as Robertson had. Robertson, who had been driving for Respondent since 1960, completed his week's work on that Friday, and received a layoff slip from Vice President Neely, bearing Neely's signature, and the following message:

Effective with the end of your tour of duty for week ending December 22, 1990, you are hereby laid off until further notice.

Respondent had not given Beversdorf any warning of his layoff. In passing, Neely remarked, in substance, that Beversdorf, Robertson, and Doube, the driver not included in the bargaining unit, who the Respondent had also laid off in December 1990, were not "cost-effective."

Doubé did not testify. Nor did the parties offer any other testimony or evidence showing the exact date and the circumstances leading up to Doube's layoff. In any event, I find that the amended complaint did not cover Doube's layoff.

Following Robertson's and Beversdorf's layoffs, Respondent continued to use between approximately 180 and 200 independent contractors to perform its work. It was to these independent contractors that Respondent subcontracted the work which Robertson and Beversdorf had been performing up to their respective layoffs.

In January, Beversdorf and Robertson filed grievances against Respondent claiming that their layoffs in December 1990 had violated the collective-bargaining agreement which had expired on October 31, 1990. Article 7 of the expired contract set forth a grievance procedure, culminating in arbitration, covering "all grievances . . . arising under and during the term of this Agreement" Respondent, in a letter dated January 21, suggested a meeting between the Union and Respondent to resolve Beversdorf's grievance. The grievances remain pending and unresolved. Respondent has not offered to recall Beversdorf or Robertson.

B. Analysis and Conclusions

1. Deferral

Respondent urges that Board policy requires that I defer the alleged violations of Section 8(a)(3) and (1) of the Act to the parties' contractual grievance-and-arbitration process. The General Counsel contends that deferral would be inappropriate on the grounds that there is no contract between the parties, that there is no arbitrator available to the parties, and that Board expertise is necessary to resolve the issues raised in the grievances. I find that Board policy bars deferral in this case.

In *United Technologies Corp.*, 268 NLRB 557, 560 (1984), the Board declared that it would defer the exercise of its jurisdiction to the arbitral process in cases involving alleged violations of Section 8(a)(1) and (3) of the Act. Under *United Technologies*, supra, deferral is appropriate

where the parties' collective-bargaining agreement includes a grievance-arbitration provision, the parties have voluntarily invoked the grievance machinery, and there is a reasonable belief that the grievance-arbitration process will resolve the dispute in a manner consistent with the Board policy expressed in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The Board has also recognized that the parties to an expired collective-bargaining agreement have no contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's expiration date. *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).⁵

In the instant case, the grievances regarding employees Robertson and Beversdorf arose when there was no longer a collective-bargaining agreement in effect between the parties. Thus, the grievance-arbitration procedure included in article 7 of the collective-bargaining agreement, which had expired on October 31, 1990, was no longer binding on them. Nor have the parties entered into any agreement providing for the arbitration of grievances which might have arisen in the bargaining unit after October 31, 1990. Thus, the Union is not required to submit Robertson's and Beversdorf's grievances, which arose out of their December 1990 layoffs, to arbitration. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57-58 (1987). Accordingly, under the Board's policy, as set out in *United Technologies Corp.*, supra, which requires the existence of a grievance-arbitration agreement, I find that deferral is not appropriate for the alleged violations of Section 8(a)(3) and (1) of the Act arising from Robertson's and Beversdorf's December 1990 layoffs.

2. The alleged violations of Section 8(a)(3) and (1) of the Act

The General Counsel contends that Respondent laid off Robertson and Beversdorf to rid itself of the Union. Respondent seeks dismissal of the amended complaint on the grounds that the 6-month period of limitation in Section 10(b) of the Act bars these allegations, and, further, that the General Counsel has not sustained his burden of proof. According to Respondent, economic problems compelled it to lay the two bargaining unit employees off.

Turning to Respondent's initial position, I find that the 6-month period of limitation, contained in Section 10(b) of the Act, did not preclude the General Counsel from amending the original complaint in this case to include the alleged discrimination against Robertson and Beversdorf. In reaching this conclusion, I took note of the Board's policy of allowing the General Counsel "to add complaint allegations outside the 6-month 10(b) period if they are closely related to the allegations of the timely filed charge." *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). In applying this "closely related" test, the Board considers, among other tests, whether the otherwise untimely allegation arose from the "same factual situation or sequence of events as the allegation in the pending timely charge." *Redd-I, Inc.*, supra, 290 NLRB at 1118.

In the instant case, both the timely allegations in the pending timely charge and the initial complaint, and those in the otherwise untimely, amended charge, filed on September 12, arose from Respondent's termination of bargaining unit em-

⁵ Cited with approval in *Litton Business Systems v. NLRB*, 111 S.Ct. 2215, 2222 (1991); *Teamsters Local 1199 v. Pepsi-Cola General Bottlers*, 958 F.2d 1331, 1336 (6th Cir. 1992).

ployees Robertson and Beversdorf, and Respondent's use of other means to perform their work. I find, therefore, that Section 10(b) of the Act did not bar the allegation of unlawful discrimination in the amended complaint, which flowed from the amended charge, and which was closely related to the allegations in the charge underlying the initial complaint.⁶

Section 8(a)(3) of the Act prohibits an employer from discriminating "in regard to . . . tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization . . ." Where the record shows that an employer's antiunion sentiment was a motivating factor in a decision to discharge an employee, the employer will be found to have violated the Act unless the employer shows that the discharge would have occurred even in the absence of the protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983). Accord: *NLRB v. E. I. du Pont & Co.*, 750 F.2d 524, 528-529 (6th Cir. 1984). Where the employer's explanation for its action are pretextual—that is, if the reasons either did not exist or were not in fact relied on—the employer has not met its burden, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd. 705 F.2d 799 (6th Cir. 1982); *Wright Line*, 251 NLRB 1083, 1084 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

In presenting his prima facie case of wrongful motive in the layoffs of drivers Robertson and Beversdorf, the General Counsel has shown that they were the only employees in the New Haven bargaining unit, which the Union represented. The record also shows that during 1989 and 1990, Respondent's owner and president, William Neely, had repeatedly expressed hostility toward the Union.⁷ Throughout that period, the Union and President Neely had a confrontational relationship, marked by "a kind of like battling." It was President Neely's oft-expressed view that getting rid of Respondent's tractors "would alleviate the necessity to have union employees." His express object in disposing of the tractors was "to break the [U]nion." As Respondent's owner and president, Neely had the power to accomplish this object.

The Central States, Southeast and Southwest Areas Pension and Health and Welfare Fund, referred to in the parties' expired contract, and to which Respondent was required to make contributions for the benefit of bargaining unit employees, annoyed President Neely in 1990. After auditing Respondent's records earlier in that year, on December 5, 1990, Central States instituted an action in Federal court, alleging

that Respondent had failed to make sufficient payments to the fund, as required in the collective-bargaining agreement covering the New Haven Foundry unit. While the audit was in progress, President Neely, in the course of complaining about it, had expressed his desire to get rid of the Union to avoid further liability to the Central States Fund. In sum, I find that an antiunion atmosphere surrounded Robertson's and Beversdorf's layoffs.

Additional circumstances suggest that President Neely's antiunion sentiment motivated Respondent when it decided on the dates for laying off Robertson and Beversdorf. One such circumstance is timing. Robertson received word of his layoff, 5 days after the Central States Fund had filed its complaint against Respondent, in Federal court, in Chicago, Illinois. Respondent waited 11 more days to tell Beversdorf that it was laying him off, effective December 22, 1990. In each instance, Respondent imposed the layoff suddenly, without giving the employee any warning. I find it significant that Respondent's letter of December 3, 1990, to the Union did not announce these layoffs and their dates. This suggests that as of December 3, 1990, Respondent had not decided on those dates. Viewed against the background of President Neely's outspoken hostility toward the Union, these two circumstances strongly support the inference that the Central States litigation provoked Respondent to rid itself of the Union.

Respondent sought to rebut the General Counsel's evidence by showing that economic considerations motivated its decision to lay off Robertson and Beversdorf. In support of its defense, Respondent offered the testimony of its vice president of sales, Michael Neely, that the reasons for the layoffs were "the holidays," "[t]he age of the equipment, the condition of the equipment," "[t]he union, wages, [and] benefits," and competition requiring Respondent to reduce its rates. However, the proffered explanation does not withstand scrutiny.

In considering the role of the Christmas holidays in Respondent's decision, I note first that its letter of December 3, 1990, to the Union failed to mention the approaching holidays as reason to hasten negotiations for a closing agreement. In any event, I find from the testimony of Vice President Neely and Respondent's director of maintenance, Terrance LeRay, that normally, during the last 2 weeks of December, Respondent shut its operations down, repaired its tractors, and laid off its drivers. However, in 1990, Respondent abandoned that practice. It laid off driver Michael Robertson effective December 8, 1990, 9 days before the beginning of the last 2 weeks of that month, and kept James Beversdorf driving until December 21, 1990, 4 days into that period. Thus, the record shows, contrary to Vice President Neely's testimony, that the approach of Christmas 1990 was not a factor in the decision to lay off the two drivers.

Terrance LeRay's testimony shows that as early as June 1990, he had concluded that the tractors assigned, respectively, to Robertson and Beversdorf were in such a state of disrepair that they were unsafe and did not satisfy Michigan's regulations regarding roadworthy tractors. The record also shows that Respondent authorized Robertson and Beversdorf to operate their tractors within Michigan, and between Michigan and points in other States, and in Canada, during the second half of 1990, on a regular basis. It was not until December 8, 1990, 3 days after the Central States

⁶In the alternative, I find that Sec. 10(b) of the Act did not bar the amendment to the initial complaint because the amended charge, which added a second legal theory for finding a violation, "was thus not an essential predicate for the [amended] complaint, as the [January 25] charge sufficiently identified the conduct in question to accord due process and fulfill the function of a charge under the Act's procedural scheme. [Citations omitted.]" *Land Air Delivery*, 286 NLRB 1131 fn. 3 (1987).

⁷At the hearing in this matter, over Respondent's objection, I permitted the General Counsel to elicit testimony regarding remarks made by Respondent's counsel, Terence K. Jolly, in the course of settlement efforts. Having reconsidered this ruling in light of Rule 408 of the Federal Rules of Evidence, I order that the testimony regarding those remarks be stricken. I also assure the parties that in reaching my findings and conclusions in this matter, I have not considered those remarks.

Pension Fund had filed its complaint in Federal court in Chicago, that Respondent decided to withdraw Robertson's tractor from service. Robertson's daily logs for the workweek beginning December 3 and ending on December 7, his last day of work, showed that he drove his tractor 1214 miles without encountering any defect in its performance. Nor was there any evidence that any state or Federal agency had inspected Robertson's tractor and directed its removal from service. The urgency with which Respondent acted, on December 8, was not reflected in its letter of December 3, 1990, to the Union.

Two weeks later, Respondent removed Beversdorf's tractor from service. There was no showing that any governmental authority had directed such action. Beversdorf had driven the truck during the preceding week without interruption by mechanical failure. Again, there was no showing of any pressing need to remove Beversdorf's tractor from service on December 21.

Respondent's letter of December 3, 1990, said that "[t]he market place" was one of the reasons for terminating its agreement with the Union. Vice President Neely testified that "[t]he union, wages [and] benefits," and competition from other trucking firms, were additional factors which motivated Respondent's decision to lay off Robertson and Beversdorf. However, assuming that these negative conditions existed in December 1990, they do not explain Respondent's apparent haste in making that decision.⁸

In sum, I find that Respondent has failed to rebut the General Counsel's strong showing that Respondent laid off Robertson and Beversdorf because they were members of the New Haven Foundry bargaining unit. I further find that Respondent resorted to these layoffs in reprisal for the Teamsters Central States Pension Fund's filing of a complaint against Respondent on December 5, 1990. Accordingly, I find that by laying off Robertson on December 8, 1992, and Beversdorf on December 21, and by subcontracting their driving work to independent contractors, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The alleged violation of Section 8(a)(5) and (1) of the Act

The Court in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964), held that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" was a mandatory subject of bargaining. Applying that holding, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with an opportunity to bargain about its decision to lay off bargaining unit employees Robertson and Beversdorf, and sub-

contract their work to independent contractors. *Continental Winding Co.*, 305 NLRB 122 (1991). Where, as in the instant case, such a decision was motivated by antiunion sentiment, the employer is not exempt from a bargaining obligation under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687-688 (1981). *Continental Winding Co.*, supra.

CONCLUSIONS OF LAW

1. W. H. Froh, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by W. H. Froh, Inc. at its New Haven Foundry Division, including over-the-road drivers, but excluding guards and supervisors as defined in the Act constitute an appropriate unit for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

4. Respondent W. H. Froh has violated Section 8(a)(3) and (1) of the Act by laying off employees Michael Robertson and James Beversdorf and subcontracting their work because the Union was their collective-bargaining representative.

5. Respondent W. H. Froh has violated Section 8(a)(5) and (1) of the Act by unilaterally laying off Michael Robertson and James Beversdorf, and subcontracting their work beginning about December 10, 1990, without providing the Union with an opportunity to bargain about its decision to do so.

6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent W. H. Froh, Inc. has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because W. H. Froh, Inc. has discriminatorily laid off employees Michael Robertson and James Beversdorf, and subcontracted their work, and has unlawfully refused to bargain with respect to the decision to subcontract the bargaining unit work and lay off the bargaining unit employees, I shall recommend that W. H. Froh, Inc. be required to restore the status quo ante as it existed prior to the unlawful subcontracting of unit work on December 10, 1990, reinstate employees Robertson and Beversdorf to their former driving positions, restore the bargaining unit work to them, and make each of them whole for any loss of wages and benefits he may have suffered as a result of the unlawful subcontracting and layoffs. *Continental Winding Co.*, supra. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁹

⁸ On September 1, 1992, approximately 6 months after I closed the record in this matter, Respondent, by letter, offered into evidence an attached letter, dated March 30, 1992, which recites the termination of a contract between Respondent, New Haven Foundry, and other firms, effective May 1, 1992. This latter date was well after the layoffs and the subcontracting referred to in the amended complaint. Thereafter, on September 8, 1992, Respondent filed a formal motion to accomplish the same purpose. The General Counsel has filed a timely motion to strike the proffered evidence on the grounds that its authenticity has not been established, and that it is irrelevant. Finding merit in the General Counsel's position, I reject Respondent's proffer.

⁹ The remedy applies to both the 8(a)(3) and (5) violations but would also be appropriate for each violation itself. *Continental Winding Co.*, supra, 305 NLRB at 126 fn. 10.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, W. H. Froh, Inc., New Haven, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in, or adherence to, the Union or any other labor organization by subcontracting bargaining unit work, by laying off or discharging any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any other term or condition of employment.

(b) Subcontracting work performed by employees in the following unit, or laying them off, without prior notice to Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and without having afforded it an opportunity to negotiate and bargain with respect to such decisions:

All employees employed by W. H. Froh, Inc. at its New Haven Foundry Division, including over-the-road drivers; but excluding guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Resume its practice of assigning all bargaining unit driving work to unit employees.

(b) Offer to Michael Robertson and James Beversdorf reinstatement to their former positions, or to substantially equivalent positions, with no loss of seniority or other rights and benefits previously enjoyed, and if necessary sever all contractual relations with others utilized to perform the driving formerly performed by them, and make them whole, with interest, in accordance with the remedy section of this decision, for any loss of pay and benefits they may have suffered because its unlawful decision to subcontract unit work and lay them off in December 1990.

(c) Remove from its files any references to the unlawful layoffs of employees Robertson and Beversdorf, and notify them in writing that this has been done and that their layoffs shall not be used as a basis for future personnel action against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in New Haven, Michigan, copies of the attached notice marked "Appendix."¹¹ Copies of the no-

tice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in, or adherence to, Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO or any other labor organization, by subcontracting bargaining unit work, by laying off or discharging any of our employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any other term or condition of employment.

WE WILL NOT subcontract work performed by our employees in the following unit, or lay you off, without prior notice to Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and without having afforded it an opportunity to negotiate and bargain with respect to such decisions:

All employees employed by W. H. Froh, Inc. at its New Haven Foundry Division, including over-the-road drivers; but excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL resume our practice of assigning all bargaining unit driving work to unit employees, and WE WILL offer to Michael Robertson and James Beversdorf reinstatement to their former positions, or to substantially equivalent positions, with no loss of seniority or other rights and benefits

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

previously enjoyed, and if necessary will sever all contractual relations with others utilized to perform the driving formerly performed by them, and make them whole, with interest, for any loss of pay and benefits they may have suffered because of our decision to subcontract unit work and lay them off in December 1990.

WE WILL remove from our files any references to the unlawful layoffs of employees Robertson and Beversdorf, and notify them in writing that this has been done and that their layoffs shall not be used as a basis for future personnel action against them.

W. H. FROH, INC.